



## Retailers And Workplace Violence

### Insights

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Under OSHA's general-duty clause, all employers have the obligation to maintain a safe workplace regardless of whether OSHA has adopted any particular standard relating to how the tasks at issue are to be performed. In the current administration, OSHA is showing a willingness to stretch the general-duty clause to cover a broader number of workplace-safety issues than ever before. One of those areas is workplace violence, whether internal among employees or external from a crime.

OSHA has focused particularly on retailers whose practices it believes provide a heightened opportunity for employees to become victims of a violent crime while on the job. On November 19, 2012, this focus became formal when OSHA issued a Citation and Notification of Penalty to a Dallas, Texas convenience store regarding failure to maintain a safe workplace by placing employees in a situation where they were "exposed to violence in the workplace."

#### **A Horrific Crime**

The citation arose out of a convenience store robbery that occurred shortly after 7:00 in the morning. 76-year-old clerk Nancy Harris opened the store at 7:00 am and was working alone. A robber came into the store, poured lighter fluid on Harris, emptied the cash register, and then set Harris on fire. A few days later, Harris died from the injuries sustained in the attack.

While the shocking nature of the crime was likely a driving force behind OSHA's involvement, OSHA has been presaging for some time its interest in workplace violence in the retail setting. In 2009, OSHA reissued its Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments. While this document was expressly stated to be advisory in nature, it noted in the same paragraph, that the general-duty clause requires employers "to provide employees with a workplace free from recognized hazards likely to cause death or serious harm."

On September 8, 2011, OSHA issued an instruction on Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents. While this instruction covered workplace violence investigations in all industries, it noted only two "High Risk" industries: healthcare and social service settings, and late-night retail settings.

#### **The Risk Factors**

OSHA has concluded that several factors make retail employees working late at night more likely to be victims of a violent crime. These include the exchange of money, solo work, isolated worksites, sale of alcohol, poorly lit stores and parking areas, and lack of training in recognizing and

sale of alcohol, poorly-lit stores and parking areas, and lack of training in recognizing and responding to hostile and aggressive behavior. These risk factors are hardly surprising. Anyone can envision being alone at night in a dimly-lit area with cash as setting themselves up to be robbed.

But the crime in the case of Nancy Harris occurred at 7:00 am, not late at night. The citation gives little to no guidance on what the retail store failed to do that exposed Ms. Harris to harm, stating only, “convenience store employees, who regularly worked with money and whose job exposed them to the potential for violence in the form of assaults and/or robberies, were not protected from workplace violence that was causing or likely to cause death or serious physical harm.”

This type of generic finding could be used to cite any retail employer whose employee is injured in a robbery. It is akin to saying, if your employee gets injured, you must have done something wrong. As such, all retail employers, regardless of whether they are open late at night, or located in a dimly-lit area, or maintain cash on hand, should assume that their employees are potential victims of workplace violence and take steps to prevent potential harm. This is not a one-size-fits-all proposition as OSHA recognizes environmental and other risk factors differ widely among workplaces.

### **Assessing Your Store’s Risk**

OSHA suggests that the first part of any workplace violence prevention program requires analyzing the workplace. They suggest analyzing three-years worth of past experience with workplace-violence incidents looking through medical, safety, workers’ compensation, and other records that might reflect incidents of workplace violence. Then the employer should screen employees to ask about incidents of workplace violence that might have gone unreported.

Finally, the store should conduct a workplace-security analysis to identify conditions that might make the store attractive to criminals. The point of the past analysis is to identify any patterns or other commonalities that should be addressed. Frankly, this seems to have little utility if a retailer is engaging in efforts to prevent workplace violence prospectively. Undertaking a thorough analysis of how to prevent a store from presenting an attractive target to robbers can be done regardless of whether there have been any incidents in the past.

Prior incidents are nevertheless important because the fact of a prior incident will make a second incident to have been more likely in OSHA’s eyes. Stores that have been robbed, even if no injuries occurred, show solid evidence of the potential for harm to employees. Retailers with many stores will want to focus initial efforts in stores with a history of crime.

OSHA suggests the actual analysis of the workplace should focus on the environmental risks. These include the store’s layout, lighting, communication systems, and security systems. The question to be asked is whether these factors increase the risk of an employee being harmed. These analyses are not necessarily intuitive or easily performed. Hiring security experts to assess how these factors create risk for the employees should result in a better analysis.

### **Preventive Measures**

Once a risk analysis is complete, an employer must take proactive steps to diminish the identified risks. The more significant a store's history of criminal or violent incidents, the more will be expected. OSHA divides preventive measures into five categories: engineering controls; work practice controls; employer response; training; and recordkeeping.

Engineering controls are physical changes to the store that protect employees from violence. OSHA suggests items such as keeping windows free of obstruction so what is transpiring at the cash register can be seen from outside the store; having adequate lighting in all areas; video surveillance systems (although given the number of videos of store robberies on You Tube, video surveillance might no longer be a deterrent); installing door buzzers so clerks hear when someone walks into the store; installing monitored alarm systems that can be activated without tipping off the criminal; installing bullet-resistant glass between the cashier and the customer; and using drop safes to limit the amount of cash accessible to the clerk.

Work practice controls include items that employees can perform that will keep them safer. These include having employees perform safety checks to ensure doors are locked and alarms and cameras are working; requiring deliveries be made during normal business hours; and having emergency procedures in place that instruct employees how to respond in a potentially violent encounter.

Employer response, since it occurs after an incident, may seem somewhat illogical as a preventive measure. But the seriousness with which an employer responds to incidents creates the culture of safety employees need. Employees who feel employers do not care or pay only lip service to safety because of a lack of follow up when an incident happens, will not have the desire to carry out the safety practices put in place.

Training is an essential component in any safety program. Employees need to understand how they should respond in the face of threats, whether it be two young boys fist-fighting or a robber with a gun pointed at them. If an employee does not know how to use the alarm system, the system is not going to effectively prevent violence. Employees also need to understand how practices such as routinely making cash drops and performing safety inspections help them. Otherwise, procedures may not be followed resulting in significant injuries.

Finally, OSHA recommends keeping records and evaluating the success of the measures taken. The risks creating opportunities for workplace violence may well change over time.

## **Looking Forward**

It would be virtually impossible for any retailer to perform all the different studies and implement all the proposed changes OSHA suggests. The key is shaping a program that is consistent with the needs of the business, does not interfere with the operations, but is effective and easy for the employees to use and follow.

No employer wants to be wakened up with a phone call advising them that one of their employees has been assaulted, shot, or worse, as in the case of Ms. Harris, set on fire. On the other hand, the only measure that might have saved Ms. Harris would have been to not let the robber in the store in the first place. But waiting until an incident occurs at a particular location before making any effort to assess the potential risk will not help an employer if an incident does occur and OSHA comes calling.

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